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Common Law Decision-Making, Constitutional Shadows, and the Value of Consistency: The Jurisprudence of William F. Batchelder

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Common Law Decision-Making,
Constitutional Shadows, and the Value of Consistency:
The Jurisprudence of William F. Batchelder

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INTRODUCTION

This is an essay about common law decision-making, with an emphasis on the value of consistency as it relates to claims about the legitimacy of judicial lawmaking. The legitimacy of judicial lawmaking is ever an issue, particularly, of course, in the cases at the margins—those instances in which precedent points the court in no obviously correct direction, a choice must be made between plausible alternative paths, and “a decision one way or the other,” as Benjamin Cardozo observed, “will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law.”¹

* Professor of Law, New England School of Law. I served as a law clerk to Associate Justice William F. Batchelder of the New Hampshire Supreme Court from August 1995 until Justice Batchelder’s retirement; I continued to serve as a law clerk to Justice Batchelder’s successor, John T. Broderick, Jr., until August 1997. Thanks are due to my colleague Jordy Singer, for his very helpful comments and suggestions; and to Elisabeth Baker, for her excellent research assistance.

1. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 165 (1921). As Israeli Supreme Court Chief Justice Aharon Barak has noted, these are the cases in which “judges must consider whether it is appropriate to change the judicial precedent itself, by expanding or restricting the existing case law or overturning an old precedent.” AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 10 (2006).

These are often the cases in which a court must address what Massachusetts Supreme Judicial Court Chief Justice Edward F. Hennessey called “[t]he most acute of all tensions”—namely, “the confrontation . . . between objectivity and the judge’s personal philosophy.”² The hope is that, when faced with the opportunity to create or reject precedent, the court will show due respect for the value of consistency—for the value that inheres in a predictable and logical approach to the interpretation, application, articulation, and extrapolation of legal rules. Consistency suggests that judicial decision-making is based upon principle rather than passion, and its presence or absence accordingly contributes to the public’s view of the legitimacy of particular instances of judicial lawmaking.³

In exploring the contribution of consistency to the legitimacy of judicial lawmaking, my focus is on two discrete cases from the New Hampshire Supreme Court—*Bonte v. Bonte*⁴ and *Aranson v. Schroeder*⁵—in which one justice—William F. Batchelder—played a significant role, joining the dissent in the first and writing for the majority in the second. Each case concerned the question whether the court should, for the first time, recognize a particular cause of action in tort. In the former case, Justice Batchelder did not approve a new cause of action; in the latter, he did. What I seek to examine here is whether these cases provide an example of the kind of inconsistency that necessarily undermines legitimacy, or whether a principled distinction between the decisions suggests an interpretive approach which could be usefully applied in other cases in which litigants seek recognition of novel causes of action.

I have chosen these particular cases, and this particular justice, deliberately. After graduation from law school and a trial court clerkship, I clerked for Justice Batchelder, and so I have some sense of how these decisions came to be. It follows that my analysis here is in no way empirical. To the contrary, this is a fairly impressionistic account of two discrete instances of common law decision-making and how one court—how one judge—navigated the critical questions presented in those instances, and

2. EDWARD F. HENNESSEY, JUDGES MAKING LAW 63 (1994). As David A. Strauss put it: “There is an old question: does a judge decide how a case will come out, and then find a justification in the law? Or does the judge approach the case with no strong prior inclination and follow the legal materials where they lead?” David A. Strauss, *What Were They Thinking?*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* 184 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

3. *Cf.* *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion) (noting that, while “[l]aws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc,” the law as declared by the courts ought to be “principled, rational, and based upon reasoned distinctions”).

4. 616 A.2d 464 (N.H. 1992).

5. 671 A.2d 1023 (N.H. 1995).

what that may say more generally about the value of consistency in common law decision-making. This essay is microhistorical in the sense that it may reveal “in fine-grained detail how larger processes operate, how [a] case serves as a useful hypothesis for exploring other cases.”⁶

At the same time, attorneys who in some future case will be making arguments about whether a new cause of action should be adopted (or rejected) would be paying attention to the same concerns at play in the two cases that I discuss herein—that is, to the various factors a court considers in determining whether to adopt a new cause of action. In other words, it is likely that the attorneys seeking to press the claim for recognition of a new cause of action, or to oppose it, would be looking at cases like *Bonte* and *Aranson* and thinking about them in similar ways, with an eye toward extracting some guidance about how a court might proceed going forward.

It may be helpful at this point to have some sense of Justice Batchelder and his tenure on the New Hampshire Supreme Court. Born in Plymouth, New Hampshire, the judge had served in the U.S. Navy in World War II and returned to earn degrees from the University of New Hampshire and Boston University Law School.⁷ He worked in private practice until Governor Walter Peterson appointed him to the Superior Court in 1970.⁸ Governor Hugh Gallen appointed him eleven years later to the Supreme Court, from which he stepped down in November 1995.⁹

By reputation Justice Batchelder was compared, with good reason, to United States Supreme Court Justice William Brennan.¹⁰ Like Brennan, Batchelder had an abiding interest in the role of the judge as protector of individual rights and liberties.¹¹ In a 1977 *Harvard Law Review* article, Justice Brennan urged state courts to view their own constitutions as a source of rights and liberties whose protections might extend “beyond those

6. See John Walton, James F. Brooks & Christopher R. N. DeCorse, *Introduction to SMALL WORLDS: METHODS, MEANING & NARRATIVE IN MICROHISTORY* 5 (John Walton, James F. Brooks & Christopher R. N. DeCorse eds., 2008) (describing microhistorical studies “in the best of circumstances”); cf. Jill Lepore, *Historians Who Love Too Much: Reflections on Microhistory and Biography*, 88 AM. J. HIST. 129, 133 (2001) (describing “microhistory” as founded on the assumption that, “however singular a person’s life may be, the value of examining it lies not in its uniqueness, but in its exemplariness, in how that individual’s life serves as an allegory for broader issues affecting the culture as a whole”).

7. Walter L. Murphy, *Tribute to Justice William F. Batchelder*, 37 N.H.B.J. 7, 7 (1996).

8. *Id.*

9. *Id.* I clerked for Justice Batchelder in the last few months of his tenure on the New Hampshire Supreme Court. In his letter offering me the job, he suggested that his current clerks wanted to get together with me for lunch and, he wrote, “[s]o you will be completely at ease during the luncheon, all they want to do is to look you over and size you up.” Letter from William F. Batchelder to author (May 17, 1994) (on file with author).

10. See Murphy, *supra* note 7, at 8.

11. See *id.*

required by the Supreme Court's interpretation of federal law."¹² The New Hampshire Supreme Court, and Justice Batchelder in particular, took a similar view and soon emerged at the vanguard of the phenomenon known as the "new judicial federalism,"¹³ the move toward resolving individual rights and liberties issues under the state constitutional counterparts to the protections contained in the federal Bill of Rights.¹⁴ That the New Hampshire Constitution and its Declaration of Rights were important to Justice Batchelder was plain to anyone who studied his decisions involving individual rights, equal protection, and criminal procedure.¹⁵

Indeed, in the end I suggest that it may well be constitutional commitments to securing particular individual rights and liberties—both state and federal—that figure most critically in distinguishing between the claim to a remedy that Justice Batchelder rejected in *Bonte*, on the one hand, and accepted in *Aranson*, on the other. While neither case was overtly about the dimensions of a particular constitutional right, in each instance specific constitutional commitments cast discrete shadows on the arguments for and against the recognition of a new cause of action. The nature and depth of these shadows may provide some clue as to how we can reconcile two seemingly disparate outcomes.

I begin, in Part I, by detailing the two decisions. Next, in Part II, I discuss the methods of common law decision-making developed by Benjamin Cardozo in his classic work, *The Nature of the Judicial Process*,¹⁶ and how those methods may be applied to the decisions of Justice Batchelder in *Bonte* and *Aranson*. Here, I discuss the extent to which Justice Batchelder's differing responses to the call to create a new common law cause of action cannot be fully explained by applying Cardozo's framework. Finally, in Part III, I argue that, when we account for the effect of certain state constitutional individual rights commitments on the plaintiffs' claims, a

12. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

13. See, e.g., *State v. Ball*, 471 A.2d 347, 352 (N.H. 1983) (addressing the state constitutional claim independently and relying upon federal authority only for the guidance it might provide).

14. See John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913, 913 n.1 (1995) (defining the new judicial federalism as state high court decision-making "based upon provisions of state constitutions that have served either as independent and adequate bases, or as the only bases, for ruling on questions of individual rights and liberties"). As Robert Williams has pointed out, the "new" judicial federalism is no longer so very new. See ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 113–14 (2009).

15. See Joanne Green, *Justice William F. Batchelder: In His Own Words*, 37 N.H.B.J. 54, 54 (1996) (noting that Justice Batchelder's interest in "individual rights and personal dignity" came "from [his] heart").

16. Cardozo, *supra* note 1.

consistency in approach emerges between Justice Batchelder's positions in *Bonte* and *Aranson*—a consistency that should alleviate some fears about decision-making based upon a “judge's personal philosophy.”¹⁷

I. THE DECISIONS

A. *Bonte v. Bonte*

In *Bonte v. Bonte*,¹⁸ the New Hampshire Supreme Court addressed the question “whether a child born alive can maintain a cause of action in tort against his or her mother for the mother's tortious conduct that caused prenatal injury.”¹⁹ Hit by a car when she was seven months pregnant, the defendant, Sharon Bonte, sustained serious injuries that required the baby to be delivered by emergency caesarean section.²⁰ Stephanie Bonte—the plaintiff—was born with brain damage that would require she receive “medical and supervisory care” for the rest of her life.²¹ Represented by her father, the plaintiff sought recovery for negligence, claiming the defendant “fail[ed] to use reasonable care in crossing the street and fail[ed] to use a designated crosswalk.”²² The plaintiff appealed from a judgment for the defendant on a motion to dismiss for failure to state a claim.²³

The court, with Justice Steven Thayer writing for the majority, first addressed the question “whether a child born alive may maintain a cause of action for injuries sustained while the child was in utero.”²⁴ The court noted precedent allowing such actions, so as not to deny children the right to recover for injuries that would affect them for life simply because they were not yet born when they sustained the injuries.²⁵ At the same time, precedent did not define against whom an action could be brought for damages suffered in utero; nor did it differentiate between injuries sustained by a mother and those sustained by a child in utero.²⁶

The court next addressed the question “whether [a] child may maintain an action against his or her mother,” looking at the history of actions by children against a parent for negligence.²⁷ Historically, New Hampshire

17. HENNESSEY, *supra* note 2, at 63.

18. 616 A.2d 464 (N.H. 1992).

19. *Id.* at 464.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Bonte*, 616 A.2d at 464–65.

25. *Id.* at 465.

26. *See generally* Bennett v. Hymers, 147 A.2d 108 (N.H. 1958).

27. *Bonte*, 616 A.2d at 465.

courts relied upon the doctrine of “parental immunity,” the principle that an unemancipated minor could not maintain an action against a parent for bodily injury caused by the parent’s negligence, a doctrine founded in the court’s commitment to preserve “the repose of families and the best interests of society.”²⁸ In a case called *Levesque v. Levesque*,²⁹ the plaintiff filed suit against his father for injuries sustained when the father negligently operated the vehicle in which they were riding. The *Levesque* court noted the wide availability of car insurance to account for a monetary award in such cases, but ruled against “creat[ing] a right of action where none would otherwise exist.”³⁰

Later, in a case called *Dean v. Smith*,³¹ the court moved away from the doctrine of parental immunity and allowed a minor plaintiff to sue his deceased father’s estate for his father’s negligence in operating the vehicle in which they were riding.³² The court again noted that the existence of insurance should not create a right of action, but this time found that the presence of insurance should be taken into account when considering whether an unemancipated child could sue a parent for negligence, because it would lessen the possibility that an award would “disrupt family harmony” or greatly affect the family financially.³³

The *Bonte* court then looked at a case called *Briere v. Briere*, which abolished the doctrine of parental immunity entirely.³⁴ Again, the issue was whether unemancipated children could sue their father for injuries sustained when he negligently operated the vehicle in which they were riding.³⁵ This time, the court found inadequate the arguments that such immunity would preserve “family harmony” and not strain the family financially,³⁶ and that the “prevalence of insurance [could not] be ignored.”³⁷ The court concluded it would be unfair to deny children “a right commonly enjoyed by all other individuals,”³⁸ and that it was not consistent to deny this right while allowing recovery for claims of contract or property rights.³⁹

28. *Levesque v. Levesque*, 106 A.2d 563 (N.H. 1954), *overruled by* *Briere v. Briere*, 224 A.2d 588 (N.H. 1966).

29. *Id.*

30. *Id.* at 564.

31. 211 A.2d 410 (N.H. 1965).

32. *Id.* at 412–13.

33. *Id.* at 413.

34. *Briere*, 224 A.2d at 591.

35. *Id.* at 589.

36. *Id.* at 590.

37. *Id.*

38. *Id.* at 591.

39. *Id.*

The *Bonte* majority tied together these doctrinal threads. It reasoned that, because children may have a cause of action against their parents for negligence, and because the court already sanctioned a cause of action for negligence for injuries sustained in utero, a child may also have a cause of action against a mother for negligent acts that injure the child in utero.⁴⁰

The majority rejected the defendant's argument that such a cause of action violated public policy, based upon the unique relationship between a pregnant woman and her unborn child.⁴¹ The majority acknowledged the uniqueness of this relationship but found that it was not sufficient to keep the court from recognizing a legal duty of a mother to her fetus.⁴² "If a child has a cause of action against his or her mother for negligence that occurred after birth and that caused injury to the child," the majority concluded, it would be illogical and contrary to precedent, "to disallow that child's claim against the mother for negligent conduct that caused injury to the child months, days or mere hours before the child's birth."⁴³

The majority also rejected the defendant's assertion that such an action would "deprive[] women of the right to control their lives during pregnancy . . . [and] unfairly subject[] them to unlimited liability for unintended and often unforeseen consequences of every day living."⁴⁴ The majority concluded that the duty of care required by a pregnant woman toward her unborn child was no different than that of a third person to the fetus, or of a mother to a child after the child is born.⁴⁵

Justice William Johnson, concurring specially, agreed with the dissent's emphasis on the unique and sensitive component of the relationship between a mother and her unborn child and that such cases should be examined in detail, with a "careful, case-by-case development of the law."⁴⁶ Nonetheless, he concurred in the holding that the breach of a duty in this instance created a foreseeable harm to the child that should be deemed actionable.⁴⁷

Chief Justice David Brock and Justice Batchelder jointly dissented. In their view, the majority did not give sufficient weight to the "privacy and physical autonomy rights of women" and what its holding would mean "for all women in th[e] state who are, or may, become pregnant."⁴⁸ While the extension of liability to a mother might follow from the existence of third-party liability, the question whether "to subject the day-to-day decisions and

40. *Bonte*, 616 A.2d at 466.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Bonte*, 616 A.2d at 466 (Johnson, J., concurring specially).

47. *Id.* at 467.

48. *Id.* (Brock, C.J., and Batchelder, J., dissenting).

acts of a woman concerning her pregnancy to judicial scrutiny” is not one properly “to be decided by a mechanical application of logic.”⁴⁹

Third parties must exercise a particular standard of care in regard to other persons, and extending this duty to unborn children “does not significantly restrict the behavior or actions of the defendant beyond the limitations already imposed.”⁵⁰ In other words, third parties could “continue to act much as they did before the cause of action was recognized.”⁵¹ But this is not the case when the same duty is imposed upon the mother: she will now have to constrain her actions based upon legal standards, where previously she was guided by her “sense of personal responsibility and moral, not legal, obligation to her fetus.”⁵²

And, the dissenters continued, there is “no existing legal duty analogous to this one, which could govern such details of a woman’s life as her diet, sleep, exercise, sexual activity, work and living environment, and, of course, nearly every aspect of her health care.”⁵³ Women carry children, after all, not because it is their fault, but because “it is a fact of life.”⁵⁴ The standard of liability created by the majority would compel a court to scrutinize in every case whether the pregnancy was planned, at what point in the pregnancy it became known to the woman, and the woman’s financial situation.⁵⁵ “Such after-the-fact judicial scrutiny of the subtle and complicated factors affecting a women’s pregnancy may make life for women who are pregnant or who are merely contemplating pregnancy intolerable.”⁵⁶

The dissenters recognized a child’s valid interest in being born “free of negligently inflicted prenatal injuries and his or her right to recover for such harm,” and the dissenters made clear they were not addressing injuries by the negligent acts of the mother that “may not directly implicate the unique relationship between mother and fetus.”⁵⁷ Rather, the dissenters were concerned “that a rule of law attempting to distinguish between acts of the mother that involve privacy interests and those that may be considered common torts would result in arbitrary line-drawing resulting in inconsistent verdicts.”⁵⁸ Accordingly, “as a matter of both judicial and public policy,” they would “decline to recognize a cause of action by a child born alive

49. *Id.*

50. *Id.*

51. *Id.*

52. *Bonte*, 616 A.2d at 467.

53. *Id.*

54. *Id.* at 468 (quotation omitted).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Bonte*, 616 A.2d at 468.

against his or her mother for the mother's negligent acts resulting in prenatal injury."⁵⁹

B. *Aranson v. Schroeder*

Aranson v. Schroeder,⁶⁰ decided just three years after *Bonte*, also involved the question whether the New Hampshire Supreme Court should recognize a new cause of action. The case began when the Town of Conway sued Mark and Kathy Aranson and the Woodland Road Realty Trust ("the trust") for allegedly selling a condominium without the legally required certificate of occupancy.⁶¹ Robert Schroeder represented the trust in the suit brought by the town, but the Aransons sought their own counsel and counter-claimed on the grounds that they were not aware the certificate was required or that any aspect of the transaction was not legally compliant. They sought rescission, as well as treble damages.⁶² The town won its suit against the Aransons and the trust, and the Aransons prevailed on their claim against the trust and trustees.⁶³ The trust and the trustees appealed the award and the New Hampshire Supreme Court affirmed.⁶⁴

The Aransons sought to enforce their judgment in Massachusetts but had not "collected a farthing"⁶⁵ from the defendants when they filed a new action in New Hampshire, asking the Superior Court to "recognize a cause of action for the tort of malicious defense, define its elements, and determine whether an attorney's law firm is also subject to liability."⁶⁶ "In effect," the court noted, the Aransons—now plaintiffs in this new suit—sought "an aspect of tort reform, the recognition at common law of a remedy where" none had existed.⁶⁷ The trial court found to be false defendant John Thompson's claim that Mr. Aranson had said he checked on the permit and that everything was "all set"; the court also concluded that defendant Schroeder falsified a document in support of this allegation, a document likely created after the Aransons filed their counterclaim.⁶⁸ The court also found that the Aransons did not know about the permit requirement until the town sued them, concluding that the plaintiffs would not have purchased the

59. *Id.*

60. 671 A.2d 1023 (N.H. 1995).

61. *Id.* at 1025.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Aranson*, 671 A.2d at 1025.

67. *Id.*

68. *Id.* at 1026.

property had the lack of a permit been known to them.⁶⁹

The Aransons argued for the creation of a new cause of action—a claim for malicious defense that would be, in essence, a “mirror image of § 674 of the Restatement (2d),” the already recognized tort of malicious prosecution or false claim.⁷⁰ The Aransons maintained the state of the law was unfair, as it “condemn[ed] false evidence from the plaintiff’s side but arguably tolerat[ed] it from the defendant’s side.”⁷¹ Both forms of misconduct, the Aransons concluded, “should be condemned, and made the subject of damages.”⁷² The lower court did not rule on the Aransons’ claim, instead transferring the case to the Supreme Court with three questions of law: (1) Does a cause of action exist against a person who allegedly created false material evidence while acting as defense counsel in a previous case and, after withdrawing as counsel, allegedly gave false testimony advancing such evidence? (2) If so, what are the elements of such a new cause of action? (3) Does such cause of action also exist against such counsel’s firm?⁷³

The New Hampshire Supreme Court, with Justice Batchelder writing for the majority, first reviewed the factors it would consider in determining whether to recognize a new cause of action.⁷⁴ As an initial matter, there is the question “whether the interest that the plaintiffs assert should receive any legal recognition.”⁷⁵ If it should, the next question is “whether the relief that the plaintiffs request would be an appropriate way to recognize it.”⁷⁶ While conducting this inquiry, the majority acknowledged that it should be mindful of Part I, article 14 of the New Hampshire Constitution, which provides to every citizen “a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character.”⁷⁷

The majority noted that no new action should be created if an action already existed that could provide the same remedy.⁷⁸ In this case, the only claim available to the plaintiffs, absent the creation of a malicious defense cause of action, was one for sanctions to attorneys engaged in the improper conduct.⁷⁹ But that remedy, the majority continued, would not provide the Aransons the damages they sought—namely, “consequential and special

69. *Id.*

70. *Id.*

71. *Id.*

72. *Aranson*, 671 A.2d at 1026.

73. *Id.* at 1025.

74. *See id.* at 1026 (quoting *Rockhouse Mountain Prop. Owners Ass’n v. Town of Conway*, 503 A.2d 1385, 1387–88 (N.H. 1986)).

75. *Id.*

76. *Id.*

77. *Id.* (quoting N.H. CONST. pt. I, art. XIV).

78. *Aranson*, 671 A.2d at 1026–27.

79. *Id.* at 1027.

damages, costs, interest, attorney's fees, and enhanced compensatory damages—the same damages to which they would have been entitled in a successful suit for malicious prosecution.”⁸⁰ Asking whether plaintiffs are “less aggrieved when the groundless claim put forth in the courts is done defensively rather than affirmatively in asserting a worthless lawsuit,” the majority concluded they are not, and that the tort of malicious defense should be adopted.⁸¹

The defendants contended that no such action had ever been adopted, but the majority pointed to cases in South Carolina and California in which courts found some form of damages for a false defense to be appropriate.⁸² As well, the majority recognized the anxiety and uncertainty that accompanies litigation.⁸³ “Here,” the majority stated, though the Aransons “prevailed in their lawsuit, they did so at a price—in time, money, and uncertainty—that was substantially exacerbated by the alleged actions of Schroeder. If a factual predicate exists to support liability and a measure of the damages thus exacerbated, the plaintiffs are entitled to a remedy to that extent.”⁸⁴ In other words, “upon proving malicious defense, the aggrieved party is entitled to the same damages as are recoverable in a malicious prosecution claim.”⁸⁵

At the same time, the majority made clear that “the mere existence of a remedy for malicious defense will not serve as a license for its abuse.”⁸⁶ Malicious defense, the majority reasoned, should be a “limited cause of action that will lie only in discrete circumstances.”⁸⁷ The court indicated it would not tolerate such claims as a means by which plaintiffs could seek to interfere with procedure or to intimidate, to limit discovery, or as a recourse when they are “merely dissatisfied with a monetary judgment.”⁸⁸

Next, the majority addressed the elements of a malicious defense claim. Here, it adopted a standard with elements that “essentially mirror those required to prove the tort of malicious prosecution”:⁸⁹

80. *Id.*

81. *Id.*

82. *Id.* (citing *Cisson v. Pickens*, 186 S.E.2d 822, 825 (S.C. 1972); *Bertero v. Nat'l Gen. Corp.*, 529 P.2d 608, 616 (Cal. 1975)).

83. See *id.* at 1028 (stating that litigation is a “disturbing influence” and causes “uncertainty”).

84. *Aranson*, 671 A.2d at 1028.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 1029.

One who takes an active part in the initiation, continuation, or procurement of the defense of a civil proceeding is subject to liability for all harm proximately caused, including reasonable attorneys' fees, if[:]

(a) he or she acts without probable cause, *i.e.*, without any credible basis in fact and such action is not warranted by existing law or established equitable principles or a good faith argument for the extension, modification, or reversal of existing law,

(b) with knowledge or notice of the lack of merit in such actions,

(c) primarily for a purpose other than that of securing the proper adjudication of the claim and defense thereto, such as to harass, annoy or injure, or to cause unnecessary delay or needless increase in the cost of litigation,

(d) the previous proceedings are terminated in favor of the party bringing the malicious defense action, and

(e) injury or damage is sustained.⁹⁰

The majority particularly noted the importance of the termination of previous proceedings in favor of the party asserting the malicious defense claim.⁹¹ As in the context of a malicious prosecution claim, this requirement serves to avoid inconsistent verdicts and unnecessary litigation; a plaintiff who loses in the original action should be barred from instituting a malicious defense claim because a judgment in favor of the defendant demonstrates that he acted with probable cause—a malicious defense claim should not be a means by which plaintiffs can reopen judgments.⁹²

Justice Thayer dissented, in the belief that the majority's holding was "unwise as a matter of policy."⁹³ Justice Thayer argued that the defendants were not claiming the Aransons had no cause of action, but that creating a

90. *Aranson*, 671 A.2d at 1028–29 (quoting Jonathan K. Van Patten & Robert E. Willard, *The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation*, 35 HASTINGS L.J. 891, 933–34 (1984)).

91. *See id.* at 1029 (explaining the importance of the termination requirement and finding "no reason why" it should not "equally appl[y]" to a malicious defense claim).

92. *Id.* The court did not address the third transferred question for lack of evidence on the record, leaving that determination for the trial court.

93. *Id.* at 1031 (Thayer, J., dissenting).

“separate cause of action for malicious defense [was not] an appropriate recognition of this interest.”⁹⁴ He argued that a separate action was not appropriate for two reasons: first, because the Aransons already had “adequate remedies” available to them; and, second, because of the significant differences between a malicious claim and a malicious defense, which justified “the existing discrepancy in remedies.”⁹⁵

As to the first reason, Thayer enumerated the existing remedies available to the Aransons, including an award of attorney’s fees and sanctions for related “out-of-pocket expenses,” as well as “statutory costs,” which he believed would be sufficient compensation for a plaintiff faced with a false defense.⁹⁶ Thayer also pointed to the possibility of holding the defendant’s attorney “personally liable for counsel fees,”⁹⁷ citing the New Hampshire Supreme Court’s decision in *Keenan v. Fearon*, in which the court held the plaintiff’s lawyer liable for the defendant’s attorney’s fees after filing an appeal without the plaintiff’s consent.⁹⁸ In addition, Thayer noted the opportunity for the court to set aside a “fraudulently obtained judgment.”⁹⁹ Finally, Thayer discussed “the possibility of criminal sanctions where perjury is part of the malicious defense,” as well as “the threat of professional disciplinary proceedings,” though he acknowledged that neither of these actions would provide direct relief to plaintiffs.¹⁰⁰

While Justice Thayer did not dispute that a disparity exists between the potential recovery for malicious prosecution and for malicious defense,¹⁰¹ he justified that disparity by the differing injuries. While defendants are unwillingly brought into court, plaintiffs willingly initiate suits; thus,

[u]nlike the defendant targeted by a malicious prosecution, the plaintiff who encounters a malicious defense voluntarily entered the judicial system and must be held to accept, to some degree, the costs and risks of litigation. When this plaintiff ultimately prevails in the action, at best only a portion of the plaintiff’s litigation costs and damages can be attributed to the malicious defense.¹⁰²

94. *Id.*

95. *Id.*

96. *Aranson*, 671 A.2d at 1031.

97. *Id.*

98. *Id.* (citing *Keenan v. Fearon*, 543 A.2d 1379, 1383 (N.H. 1988)).

99. *Id.*

100. *Id.*

101. *Id.* at 1032.

102. *Aranson*, 671 A.2d at 1032.

Further, Justice Thayer pointed to the possibility of increased and unwarranted litigation,¹⁰³ arguing that plaintiffs dissatisfied with the amount of a judgment may use the action to “augment their recovery,” and if a defendant is “judgment-proof,” plaintiffs might use the action to recover from the defendant’s lawyers instead.¹⁰⁴ Thayer also noted the possibility that the tort could undermine a defendant’s ability to mount a “vigorous defense” in fear that such an effort would later be deemed “malicious.”¹⁰⁵

Such an action, moreover, would be inconsistent with the rule that “statements made in the course of judicial proceedings are absolutely privileged from civil actions, provided they are pertinent to the subject of the proceeding,”¹⁰⁶ and Thayer noted that even when the defendant “inject[ed] . . . privileged material itself into the case,” a waiver of confidentiality might have a detrimental effect on attorney-client privilege.¹⁰⁷ He also observed that in most cases, it would be a plaintiff claiming the defendant was liable for part or all of their attorney’s fees, which would inevitably require a determination as to the portion of the fees tied to the malicious defense and a “highly invasive review of documents normally protected by the attorney-client privilege.”¹⁰⁸ Concluding that the addition of a cause of action for malicious defense to New Hampshire’s common law was undesirable, Justice Thayer noted that not only had no other jurisdiction in the country recognized such an action, but courts in other jurisdictions had explicitly rejected it.¹⁰⁹

C. Are Justice Batchelder’s Positions in *Bonte* and *Aranson* Consistent?

To review: both *Bonte* and *Aranson* involved arguments about a novel cause of action: in *Bonte*, the plaintiff sought relief by imposing liability on his mother for her negligent actions when he was in utero; in *Aranson*, the plaintiffs sought relief by imposing liability on opposing counsel in a previous case for his actions in that litigation. So characterized, the claims in these cases generally appear similar, each in its way seeking, in the words of the state constitutional guarantee, “a certain remedy . . . for . . . injuries.”¹¹⁰ And in this light, Justice Batchelder’s positions in each appear to be in direct opposition, as he voted to deny *Bonte* an opportunity to seek relief and

103. *See id.* (stating that the action could motivate future litigation in a way previously not recognized).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1032–33.

108. *Aranson*, 671 A.2d at 1033.

109. *Id.*

110. *Id.* at 1026 (quoting N.H. CONST. pt. I, art. XIV).

approved the Aransons' bid to do the same.

But I want to argue here that, in fact, Justice Batchelder acted consistently in each case. If judicial legitimacy is premised to some extent upon the value of consistency, then it behooves us to determine whether Justice Batchelder got it right when he reached different results in a pair of cases in which the court was asked to recognize a new common law cause of action. These are the instances, as Chief Justice Hennessey recognized, in which the third branch is going about the business of making law—instances, in other words, when we ought to pay close attention to whether judges are making decisions based upon their personal philosophies, rather than upon objectively verifiable principles.¹¹¹

To show why I believe Justice Batchelder's positions are consistent in *Bonte* and *Aranson* requires a framework for charting the possible approaches to common law decision-making. The classic understanding of the way in which state judges go about their business comes from Benjamin Cardozo and his lectures on the judicial process.¹¹² In the next Part, I review Cardozo's framework and use it to evaluate Justice Batchelder's decisions in *Bonte* and *Aranson* to determine whether they are consistent despite their different outcomes.

II. *BONTE, ARANSON*, AND THE METHODS OF COMMON LAW DECISION-MAKING

In *The Nature of the Judicial Process*, Benjamin Cardozo sought to shed light on the principles that guide judicial discretion.¹¹³ The judge, he argued, “must first extract from the precedents the underlying principle, the *ratio decidendi*; he must then determine the path or direction along which the principle is to move and develop, if it is not to whither and die.”¹¹⁴ Even after a principle has been identified, “[t]he problem remains to fix the bounds and the tendencies of development and growth, to set the directive force in motion along the right path at the parting of the ways.”¹¹⁵

In addressing this problem, Cardozo identified four interpretive avenues available to a judge: (1) the path of logic—what Cardozo called “the rule of analogy or the method of philosophy”; (2) the path of historical development, what he called “the method of evolution”; (3) the path of the customs of the community, which he called “the method of tradition”; and (4) the path of

111. See HENNESSEY, *supra* note 2, at 2–3 (stating common law decision-making is one of the areas in which “the legitimacy of the court is problematic”).

112. See generally Cardozo, *supra* note 1.

113. See *id.* at 19.

114. *Id.* at 28.

115. *Id.* at 30.

justice, morals and social welfare, which he called “the method of sociology.”¹¹⁶ In what follows, I explore each of these alternatives and seek to determine which, if any, support the consistency of Justice Batchelder’s decisions in *Bonte* and *Aranson*.

A. The Method of Philosophy

The method of philosophy, Cardozo explained, enjoys “the primacy that comes from natural and orderly and logical succession.”¹¹⁷ It of course “will not do to decide the same question one way between one set of litigants and the opposite way between another,”¹¹⁸ he wrote, and logic ought to control if “the affairs of men are to be governed with the serene and impartial uniformity which is of the essence of the idea of law.”¹¹⁹

The majority opinion in *Bonte* neatly illustrates a purely logical approach to common law decision-making. Justice Thayer determined, first, that precedent supported a cause of action by a child against a parent; and, second, that precedent supported a cause of action for negligence for injuries sustained in utero.¹²⁰ Faced with a claim by a child for negligence against his mother for injuries suffered while she was pregnant with him, Justice Thayer concluded that this was simply a variation on specific actions the court had already sanctioned in respect to the injury allegedly suffered and the potential for a remedy.¹²¹ Justice Thayer’s reasoning may be (crudely) diagrammed thus: $(x_1 + x_2 = y)$, where x is a valid, previously-recognized cause of action.

But while this diagram illustrates the role of logic in consistent decision-making, it also shows that the *Bonte* majority’s perspective on the precedents and the issues in the case could be seen as fairly reductive. In *The Nature of the Judicial Process*, Cardozo warned that pure logic will take us only so far.¹²² Some cases, for example, will present two plausible and logical paths, requiring that we “make a choice between [logical paths].”¹²³ And in other cases, reliance upon logic may threaten to become an end unto itself, blinding a judge to the other possibilities: “The misuse of logic . . . begins,” Cardozo stated, “when its method and its ends are treated as supreme and final.”¹²⁴

Indeed, the dissenters in *Bonte* acknowledged the force of the majority’s

116. *Id.* at 30–31.

117. Cardozo, *supra* note 1, at 31.

118. *Id.* at 33.

119. *Id.* at 36.

120. *See Bonte*, 616 A.2d at 466.

121. *See id.*

122. Cardozo, *supra* note 1, at 43.

123. *Id.*

124. *Id.* at 46.

logic, but they nonetheless saw that path as leading to future problems—namely, the possibility that “the day-to-day decisions and acts of a woman concerning her pregnancy” could be subjected “to judicial scrutiny.”¹²⁵ And yet, in *Aranson*, Justice Batchelder—now writing for the majority—relied upon the kind of formulaic logic employed in *Bonte* to conclude that the court should embrace a new cause of action for malicious defense: if the only remedy available to an aggrieved plaintiff were sanctions, he reasoned, and if that remedy could not provide plaintiff a full recovery, and if damages were available when a party was equally aggrieved by a malicious prosecution, it followed that the court should adopt the tort of malicious defense.¹²⁶ Here, Justice Batchelder’s conclusion may be diagrammed thus: ($x = y$), where x is an action for malicious prosecution and y an action for malicious defense.

This diagram of the reasoning in *Aranson* is no less reductive than the diagram of Justice Thayer’s reasoning in *Bonte*; an examination of Cardozo’s method of philosophy—the path of logic—has moved us no closer to understanding how Justice Batchelder’s positions in *Bonte* and *Aranson* could be viewed as consistent. Logical reasoning is a hallmark of consistency and, therefore, judicial legitimacy, but, as Cardozo labored to explain, it is not the sole means by which a judge determines which path the law will follow. In the many cases in which logic proves inadequate to the complexities of determining the law’s path, Cardozo argued that “[h]istory or custom of social utility or some compelling sentiment of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law must come to the rescue of the anxious judge, and tell him where to go.”¹²⁷

B. The Methods of History and Custom

History, Cardozo argued, may confine and direct the path of logic: “the effect of history is to make the path of logic clear.”¹²⁸ He meant that “history, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future.”¹²⁹ What has come before, in other words, may give a judge a good indication of whether a rule or set of rules has proved adequate to the task for which it was designed, or whether a modification is in order.

The method of history so understood, it seems clear that a resort to history will not provide the connecting link between Justice Batchelder’s positions in *Bonte* and *Aranson*. Recall that in each case, the plaintiff sought

125. *Bonte*, 616 A.2d at 467 (Brock, C.J., and Batchelder, J., dissenting).

126. *Aranson*, 671 A.2d 1023, 1027 (N.H. 1995).

127. Cardozo, *supra* note 1, at 43.

128. *Id.* at 51.

129. *Id.* at 53.

a rule that would allow a remedy for injuries allegedly suffered as a result of certain actions by the defendant, and which presumably would deter such injurious actions in the future. In *Bonte*, the dissenters denied that the relevant history—the evolution in negligence law that came to allow both actions by children against their parents and by children against third parties for injuries suffered in utero—was apposite.¹³⁰ Indeed, they argued essentially that this history revealed nothing about the potential consequences of exposing women to potential liability to their own children while they are in utero.¹³¹

In *Aranson*, by contrast, Justice Batchelder relied upon the historically favorable experience with the tort of malicious prosecution to bolster the argument for adopting the tort of malicious defense.¹³² Given that the wronged party is similarly aggrieved in each instance, he saw no reason why liability should not exist for the wrong of malicious defense just as it does for malicious prosecution.¹³³ To the extent Justice Batchelder's positions in *Bonte* and *Aranson* may be seen as consistent, it is not because he found the path of history to be persuasive in each case: in one, he rejected favorable history as essentially irrelevant; in the other, he embraced it.

"If," Cardozo continued, "history and philosophy do not serve to fix the direction of a principle, custom may step in."¹³⁴ But custom is less relevant "in the making of new rules as in the application of old ones."¹³⁵ In both the cases under discussion here, the court was concerned with the making of new rules, and custom—the ways in which the rules have over time come to work—provides little guidance in evaluating the consistency of Justice Batchelder's decisions in these cases.

C. The Method of Sociology

"The final cause of law," Cardozo observed, "is the welfare of society."¹³⁶ He continued:

Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all. . . . [When judges] are called upon to say how far

130. *Bonte*, 616 A.2d at 467.

131. *Id.*

132. *Aranson*, 671 A.2d at 1028.

133. *Id.* at 1029.

134. Cardozo, *supra* note 1, at 58.

135. *Id.* at 62.

136. *Id.* at 66.

existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance.¹³⁷

By “social welfare,” Cardozo meant, “what is commonly spoken of as public policy, the good of the collective body.”¹³⁸ Judges accordingly should move away from “the conception of a lawsuit as either a mathematical problem or a sportsman’s game,” and think “of the end which the law serves, and fitting its rules to the task of service.”¹³⁹ Within the limits of their discretion, “within the range over which choice moves, the final principle of selection for judges, as for legislators, is one of fitness to an end.”¹⁴⁰

Still, judgments must be justified under “objective or external standards,” lest they become “a jurisprudence of mere sentiment or feeling.”¹⁴¹ Objective principles ought to provide for “symmetrical development” in the common law, consistent with “history or custom when history or custom has been the motive force, or the chief one, in giving shape to existing rules, and with logic or philosophy when the motive power has been theirs.”¹⁴² “Symmetrical development,” however, “may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare.”¹⁴³

The problem is that judges must discern the point at which the interest in symmetrical development becomes associated with “uniformity of oppression.” Cardozo suggested that the judge will know “when one interest outweighs another” from his or her “experience and study and reflection; in brief, from life itself.”¹⁴⁴ Cardozo had great faith in the abilities of judges: “if they act with conscience and intelligence, they ought to attain in their conclusions a fair average of truth and wisdom.”¹⁴⁵

Here we have a method of judicial decision-making with which we can attempt to reconcile Justice Batchelder’s positions in *Bonte* and *Aranson*: the method of sociology, the directive to safeguard social justice when its value would be denied by the operation of logic and history. Thus in *Bonte* the dissenters could have viewed the logical creation of a cause of action for a

137. *Id.* at 66–67.

138. *Id.* at 72.

139. *Id.* at 101–02.

140. Cardozo, *supra* note 1, at 103

141. *Id.* at 106.

142. *Id.* at 112.

143. *Id.* at 112–13.

144. *Id.* at 113.

145. *Id.* at 136.

child against his mother for her negligent acts while he was in utero as oppressive to women, potentially subjecting a mother's every decision to judicial scrutiny. And in *Aranson*, Justice Batchelder could have viewed the creation of a cause of action for malicious defense as means by which to prevent the oppression of plaintiffs who otherwise would have no recourse against the malicious actions of defendants in litigation.

Notwithstanding Cardozo's faith in the intelligence and conscience of judges, this reconciliation of Justice Batchelder's positions in *Bonte* and *Aranson* depends upon agreement with an unspecified notion of social justice. Notably, the state constitution itself, in Part I, article 14, supplied the court and the litigants in these cases with a quite specific notion of social justice—that every citizen shall have “a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character.”¹⁴⁶ A conscientious judge, seeking to achieve social justice in these cases and aware of the outermost limits on a judge's ability to innovate,¹⁴⁷ need look no further: in addition to the logic and history of precedent, Part I, Article 14 suggests that the end of social justice may be secured through the provision in the common law of remedies for injuries, which in each of these cases would have warranted the recognition of a new cause of action.

And so Justice Batchelder's decisions in *Bonte* and *Aranson* still appear to point in different directions. Is it possible to explain the apparently inconsistent regard for the premise of Article 14 in each? Perhaps Justice Batchelder recognized the import of the constitutional promise of a remedy for all injuries in *Aranson*, but not in *Bonte*, because he (along with Chief Justice Brock) saw the potential for oppression in lawsuits by children against their mothers for injuries suffered from her negligence while they were in utero as a *greater* injustice than the lack of a remedy for children in that situation. In this light, Justice Batchelder's position in *Bonte* could be viewed as idiosyncratic—as a product of the peculiar facts of the case—and yet just, in the sense that the potential harm to women outweighed the plaintiff child's competing interest.

Whether it would have satisfied Cardozo, this explanation might not save Justice Batchelder from the charge that his position in *Bonte* was motivated by a personal philosophical objection to the majority's conclusion. Why, for instance, should the interest in protecting mothers be accorded greater weight than the interest in providing a remedy for their children? As a general matter, moreover, we should prefer that decisions in similar cases involving

146. N.H. CONST. pt.1, art. XIV.

147. After all, as Cardozo put it, “[t]he cells in which there is motion do not change the proportions of the mass.” Cardozo, *supra* note 1, at 136.

similar claims be reconciled—if at all possible—for in such consistency lies not just a sound basis for viewing judicial lawmaking as legitimate, but guidance for lawyers and judges wrestling with similar issues in the future. In respect to *Bonte* and *Aranson*, logic, history, and sociology do not, either alone or together, get us there. But accounting for the potential influence of other constitutional concerns—that is, concerns beyond Article 14—just might, as I explain in the next Part.

III. ACCOUNTING FOR CONSTITUTIONAL SHADOWS

As noted above, Part I, Article 14 of the New Hampshire Constitution guarantees to each individual “a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character.”¹⁴⁸ This commitment has been interpreted by the New Hampshire Supreme Court as serving two purposes: “to make civil remedies readily available, and to guard against arbitrary and discriminatory infringement on access to the courts.”¹⁴⁹ The court has held that these rights “are necessarily relative,”¹⁵⁰ and that Article 14 “does not guarantee that all infringed persons will receive full compensation for their injuries.”¹⁵¹

By its terms, Article 14 does not compel the courts of New Hampshire to create new causes of action upon request.¹⁵² But, as discussed above, it does give a constitutional imprimatur to a particular social justice value—namely, the value in providing at least an opportunity for individuals to demonstrate they are entitled to a remedy for injuries they have suffered. In a much earlier case, Justice Batchelder noted that the law has long “endeavored to provide rational remedies to those persons whose lot in life has taken a detrimental turn as a result of the conduct of others who have breached a duty owed to the injured party.”¹⁵³

Thus Article 14 casts a distinct shadow on the judicial determination whether to create a new cause of action. To be clear, this is not the “shadow of the law” that necessarily influences the strategic behavior of parties in litigation to push for either settlement or trial.¹⁵⁴ It is, rather, a constitutional marker, one that suggests that, in appropriate cases, a court should consider the implications of leaving individuals without an opportunity to seek a

148. N.H. CONST., pt. 1, art. XIV.

149. *Estate of Cargill v. City of Rochester*, 406 A.2d 704, 706 (N.H. 1979).

150. *Sousa v. State*, 341 A.2d 282, 284 (N.H. 1975).

151. *Cargill*, 406 A.2d at 706.

152. *See id.* (noting that, in the face of compelling public policy reasons, the victims of negligence may be barred from recovery).

153. *Kingsbury v. Smith*, 442 A.2d 1003, 1004 (N.H. 1982).

154. *See* Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982).

remedy. As Justice Batchelder observed in *Aranson*, a court ought to “keep in mind”¹⁵⁵ Article 14 when it considers whether to recognize a plaintiff’s interest in relief and whether the relief requested would be appropriate.¹⁵⁶

Justice Batchelder’s decision in *Aranson* expressly reflects the impulse to “keep in mind” Article 14’s mandate. Nonetheless, as discussed above, Article 14’s shadow does not, in itself, provide the key to reconciling his positions in *Bonte* and *Aranson*, for that shadow leans in just one direction: toward the path favoring judicial recognition of a legitimate need for the common law to provide individuals a remedy. In *Bonte*, of course, Justice Batchelder and Chief Justice Brock criticized their colleagues in the majority for following this very path.¹⁵⁷

But in *Bonte*, unlike in *Aranson*, Article 14 was not the only constitutional provision to cast a shadow on the determination whether to recognize a new cause of action. A constitution, after all, will often embrace numerous values of differing dimensions, some of which may be in tension with others. Once we accept the possibility that a court, in deciding whether to recognize a new action, may need to account for both the value that inheres in the availability of a remedy and another, competing value, the way is made clear to see the consistency in Justice Batchelder’s decisions in *Bonte* and *Aranson*. Indeed, on this view, the difference between the decisions comes down to one fact: the shadow over the determination in *Bonte* cast by another, arguably superior constitutional value.¹⁵⁸

Recall that, in their dissenting opinion in *Bonte*, Chief Justice Brock and Justice Batchelder criticized the majority for discounting “the problems associated with legally recognizing a mother’s duty to her fetus,” and questioned whether it was “possible to subject a woman’s judgment, action, and behavior as they relate to the well-being of her fetus to a judicial determination of reasonableness in a manner that is consistent and free from arbitrary results.”¹⁵⁹ They explained that the nature and scope of the duty recognized by the majority would involve extensive “after-the-fact judicial scrutiny of the subtle and complicated factors affecting a woman’s pregnancy,” scrutiny that could “make life for women who are pregnant or who are merely contemplating pregnancy intolerable.”¹⁶⁰ For these reasons, the dissenters believed the duty of a mother to her unborn child should

155. 671 A.2d at 1026.

156. *See id.*

157. *See Bonte*, 616 A.2d at 468 (Brock, C.J., and Batchelder, J., dissenting).

158. To put the point into Dworkinian terms, shadow-casting constitutional values represent principles of law which judges “must take into account, if [they are] relevant, as a consideration inclining in one direction or another.” Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 26 (1967).

159. *Bonte*, 616 A.2d at 468 (Brock, C.J., and Batchelder, J., dissenting).

160. *Id.*

“remain a moral obligation which, for the vast majority of women, is already freely recognized and respected without compulsion by law.”¹⁶¹

The dissenters did not explore in detail the pedigree of the “privacy interests”¹⁶² they argued would be undermined by the majority’s newly-created duty to the unborn child, but it requires no great stretch to connect these interests to the individual autonomy rights protected under the United States Constitution. Indeed, the New Hampshire Supreme Court decided *Bonte* just months after the United States Supreme Court issued its decision in *Planned Parenthood v. Casey*,¹⁶³ in which it reaffirmed the core constitutional principles recognized in *Roe v. Wade*.¹⁶⁴ In *Casey*, the plurality opinion made clear that the U.S. Constitution has long protected, and would continue to protect, “a realm of personal liberty which the government may not enter,”¹⁶⁵ a realm which includes aspects of individual and intimate decision-making regarding procreation, family, and parenthood, and which includes a woman’s right to choose.¹⁶⁶

The constitutional implications of the rule adopted by the *Bonte* majority might have been more apparent had the state legislature enacted it. In a challenge to such a law, a court would need to determine, as an initial matter, whether the rule implicated a fundamental right, which would in turn trigger some form of heightened judicial scrutiny.¹⁶⁷ To this end, the court would ask whether the asserted interest was “deeply rooted in this Nation’s history and traditions, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed.”¹⁶⁸ The first inquiry addresses the historical support the interest has received in American law; the second seeks to ascertain whether, if this interest were not deemed to be fundamental, the most basic sense of liberty in our constitutional republic would be at risk.

What is the specific interest implicated by the *Bonte* majority’s rule? It can be described as the freedom of a woman, during the course of her pregnancy, to make without fear of sanction the innumerable everyday decisions that potentially could affect her well-being or that of her unborn child. These are decisions about such mundane matters as whether to drive an automobile, or to ride a bicycle, or even to walk across a street. This kind of decision-making ordinarily is subject only to generalized regulation—for

161. *Id.*

162. *Id.*

163. 505 U.S. 833 (1992).

164. 410 U.S. 113 (1973).

165. *Casey*, 505 U.S. at 847.

166. *See id.* at 849 (recounting cases).

167. *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997).

168. *Id.* at 721.

instance, the requirement that all drivers possess a valid license.¹⁶⁹

Turning first to the nation's history and legal traditions, it seems clear that the common law regulation of pregnant women through the availability of a negligence action is a relatively recent phenomenon.¹⁷⁰ Further, there is little evidence supporting the view that at the time of the framing of either the U.S. Constitution in 1787 or the Fourteenth Amendment in 1867—much less the New Hampshire Constitution of 1784—the unborn could bring a civil suit against their mothers for the consequences of her negligent acts during the course of the pregnancy. As the U.S. Supreme Court explained in *Roe v. Wade*, the text of the federal constitution does not suggest that the unborn should be considered “persons” within the meaning of the Fourteenth Amendment, much less that they are a specially protected class.¹⁷¹

Further, a woman's interest in making everyday decisions about how she will live her life could be seen as implicit in the concept of ordered liberty. The autonomy to, for example, move about freely—to decide where to go and how to get there, restricted only by the regulations that affect all persons—would seem to be critical to the enjoyment of not just other constitutional liberties, but to a woman's ability to fulfill the obligations and responsibilities of citizenship. The potential for civil liability could effectively reduce the compass of a woman's freedom during the course of her pregnancy—the world, after all, is a dangerous place to negotiate on our best days, and it is difficult (if not impossible) to foresee all the many ways in which the many hazards of everyday life potentially could result in harm to an unborn child.¹⁷² Regulation along the lines of the *Bonte* majority's negligence rule would represent at least a modest step toward the world of Margaret Atwood's novel, *The Handmaid's Tale*, in which certain women consigned by the ruling elite to serve as vessels for reproduction were deprived the freedom to make decisions that might result in harm to the children they were carrying.¹⁷³

For these reasons, a court could well declare fundamental a woman's interest in the ability, free from fears about potential tort liability, to make daily decisions while pregnant; such a conclusion would subject laws that undermine this interest to something more intense than mere rational-basis judicial scrutiny. This interest would be implicated regardless of whether the

169. See, e.g., N.H. REV. STAT. ANN. § 263:1 (“No person, except those expressly exempted . . . shall drive any motor vehicle upon any way in this state unless such person has a valid driver's license, as required under the provisions of this chapter, for the class or type of vehicle being driven.”).

170. See *Remy v. MacDonald*, 801 N.E.2d 260, 264 (Mass. 2004) (discussing cases).

171. *Roe*, 410 U.S. at 157–58.

172. See *Bonte*, 616 A.2d at 468 (Brock, C.J., and Batchelder, J., dissenting) (noting the myriad factual “circumstances and complexities of the factors at play”).

173. MARGARET ATWOOD, *THE HANDMAID'S TALE* (1985).

legislature or a court adopted a rule imposing liability on a woman for her allegedly negligent decision-making while pregnant.

And so, like the value of a remedy embraced by Article 14, the constitutional value that inheres in a woman's "privacy interests" casts a shadow in *Bonte* on the determination whether to recognize a new cause of action, and the court must assess the influence of these respective shadows on that question.¹⁷⁴ On the one hand, the *Bonte* majority's rule creates the potential for regulation, which could over time operate to diminish the autonomy of a percentage of the state's female population for a portion of their lives. On the other, a child has a legitimate interest in compensation for prenatal harms inflicted by a mother's negligence. Of course, as the *Bonte* dissenters noted, even absent a cause of action compelling her to act, the duty of a mother to her child "remains a moral obligation which, for the vast majority of women, is already freely recognized."¹⁷⁵ On balance, the *Bonte* dissenters reasonably could have concluded that the shadow created by the value of a woman's autonomy is sufficiently deep that it, and not the value of a remedy, ought to bear more immediately on the determination whether to declare a new common law cause of action. At a minimum, the federal precedent supporting the validity of a woman's interest in autonomous decision-making provides an explanation for the *Bonte* dissenters' objection to a new cause of action that rests on a ground more legitimate than that of personal philosophical preference.

As this discussion indicates, the court in *Aranson* did not have to address a tension between competing values—in other words, there was no constitutional interest against which the *Aranson* court had to balance the plaintiff's request for a remedy for having allegedly suffered a malicious defense. In that case, Justice Batchelder could acknowledge the shadow cast by Article 14 and, as he once counseled, "keep in mind"¹⁷⁶ the provision's promise of "a certain remedy . . . for all injuries."¹⁷⁷

That the presence of a second and arguably deeper constitutional shadow in *Bonte* allows us to reconcile that case and *Aranson* is supported by another, earlier decision of the New Hampshire Supreme Court, one also written by Justice Batchelder. In *Kingsbury v. Smith*, the court addressed the question whether New Hampshire recognizes a claim for "wrongful birth."¹⁷⁸ Justice Batchelder construed this claim as one for "'wrongful conception,' which is an action for damages arising from the birth of a child to which a

174. Cf. Dworkin, *supra* note 158, at 27 (suggesting that, when principles intersect, "one who must resolve the conflict has to take into account the relative weight of each").

175. *Bonte*, 616 A.2d at 468 (Brock, C.J., and Batchelder, J., dissenting).

176. *Aranson*, 671 A.2d at 1026.

177. N.H. CONST., pt. I, art. XIV.

178. 442 A.2d 1003, 1004 (N.H. 1982).

negligently performed sterilization procedure, or a negligently filled birth control prescription which fails to prevent conception, was a contributing factor.”¹⁷⁹ His opinion for the court concluded that, assuming all the elements of a medical malpractice claim were present, the common law of New Hampshire would permit such an action.¹⁸⁰

In reaching this conclusion, Justice Batchelder reasoned that non-recognition of this action would “leave[] a void in the area of recovery for medical malpractice and dilute[] the standard of professional conduct and expertise in the area of family planning.”¹⁸¹ He was bolstered in this view by the fact that family planning decisions have been “clothed with constitutional protection,”¹⁸² citing, among other cases, *Roe v. Wade* and *Griswold v. Connecticut*,¹⁸³ in which the U.S. Supreme Court held that substantive due process protects certain kinds of intimate decision-making from government intrusion absent the most compelling interest.

Kingsbury makes clear the consistency between Justice Batchelder’s decisions in *Bonte* and *Aranson*. The connecting link is the relationship between the constitutional shadows at play in each case. In *Kingsbury*, there was no tension between the value of a remedy promoted by Article 14 and the constitutional protection afforded procreative decision-making, for an action for wrongful conception could serve that autonomy interest by potentially deterring its private infringement. In *Bonte*, however, the recognition of an unborn child’s claim against her mother for her negligent acts while she was pregnant was in tension with a woman’s interest in autonomous decision-making, requiring the court to determine which constitutional value should prevail. Finally, in *Aranson*, there was no tension between Article 14’s promise of a remedy and any another constitutional interest, so Justice Batchelder could focus his analysis upon the standard considerations that go into determining whether to recognize a new common law claim.

CONCLUSION

Consistency provides some assurance that particular outcomes of judicial lawmaking will be predictable and not arbitrary. The goal of this essay was simply to see whether we could find some consistency between Justice Batchelder’s decisions in *Bonte v. Bonte* and *Aranson v. Schroeder*, where differing outcomes in what appeared to be similar situations appeared

179. *Id.* (citations omitted).

180. *See id.* at 1005.

181. *Id.*

182. *Id.* at 1005–06.

183. 381 U.S. 479 (1965).

to suggest the results flowed more from personal philosophy than reasoned legal analysis. The key to reconciling the decisions lay in untangling the shadows cast by certain constitutional commitments on the judicial determination whether to recognize a new cause of action. The rule of decision that emerges from this analysis allows us to both reconcile Justice Batchelder's decisions in *Bonte* and *Aranson* and find some guidance in that reconciliation for future cases.

That rule of decision requires an initial judicial inquiry into the constitutional implications of adopting a new cause of action. Article 14 supports, as a matter of state constitutional law, the creation of just remedies for injuries suffered; as an initial matter, a court must determine whether this value is in tension with another, settled constitutional interest. Should such a tension be discovered, the *Bonte* dissent suggests it ought to be considered and resolved as a part of its determination whether to expand the common law and embrace the new claim. When, on the other hand, such a tension does not exist, *Aranson* suggests the court should focus exclusively on the traditional concern of judicial lawmaking in this context—that is, whether the common law should “provide rational remedies to those persons whose lot in life has taken a detrimental turn as the result of the conduct of others.”¹⁸⁴

* * *

In addition to his work on the bench, Justice Batchelder kept a small farm in his native Plymouth; there his wife tended to the sheep and he the fields littered with the stones that comprise many New England walls.¹⁸⁵ These stones found their way into his judicial writing; in one decision, he compared public policy to “Robert Frost's stone wall,” which could be viewed “with a purpose to determine what claims are walled in and what claims are walled out.”¹⁸⁶

Given his fondness for New England's stone walls, Justice Batchelder likely would have appreciated this guidance from a stonemason, as recounted by the writer John Jerome:

Once I left a stone unstable, rocking on a high spot. She spotted it immediately. “I don't like that and neither do you,” she said, pulling it down, turning it over, giving its underside a couple of good whacks with hammer and chisel, and plopping it firmly and securely in its place.¹⁸⁷

184. *Kingsbury*, 442 A.2d at 1004.

185. See *Murphy*, *supra* note 7, at 8 (noting that “[Justice Batchelder's wife] Betty does the farming; Bill talks about it”).

186. *Welzenbach v. Powers*, 660 A.2d 1133, 1135 (N.H. 1995).

187. JOHN JEROME, *STONE WORK* 56 (1989).

As Justice Batchelder's decisions in *Bonte* and *Aranson* demonstrate, common law decision-making is not entirely unlike stone work: for what are the judges doing but pulling out a proposed cause of action, turning it over and giving it some shape, so that it fits "firmly and securely in its place"—or concluding, upon close inspection of the ways in which constitutional shadows fall upon it, that this action will ultimately prove unstable, leaving the law "rocking on a high spot"?